IN THE

Supreme Court of the United States

NO. _____

76-1477

DAVID RUBEN JOHNSON,

Petitioner,

v.

THE STATE OF GEORGIA,

Respondent.

PETITION FOR A WRIT OF CERTIORARI TO THE SUPREME COURT OF GEORGIA

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PETITION FOR A WRIT OF CERTIORARI TO THE SUPREME COURT OF GEORGIA

David Ruben Johnson, Petitioner, prays that a Writ of Certiorari issue to review the decision of the Supreme Court of Georgia in refusing to accept Petitioner's Application for the Writ of Certiorari to that Court, entered in that case on January 7, 1977.

OPINIONS BELOW

Petitioner was convicted and sentenced for simple battery and appealed his conviction to the Georgia Court of Appeals. His conviction was affirmed, but the sentence was remanded for resentencing because of errors committed in the pre-sentence hearing. Following his being resentenced, Petitioner appealed his resentencing on the grounds that the resentencing by the same judge constituted a denial of his Sixth and Fourteenth Amendment rights. The opinion of the Court of

Appeals of Georgia affirming Petitioner's resentencing is reported at 140 Ga. App. 284 (1976) and is attached hereto as Appendix "A."

Petitioner then filed his Motion for Rehearing in the Georgia Court of Appeals. This was denied; a copy of the order denying this motion is attached hereto as Appendix "B."

Petitioner then carried his case to the Supreme Court of Georgia by Writ of Certiorari. That Court denied Certiorari without opinion on January 7, 1977, a copy of the Notice of Denial being attached hereto as Appendix "C." Petitioner thereafter filed his Motion for Reconsideration which was denied without opinion by the Supreme Court of Georgia on January 27, 1977, a copy of this Notice of Denial is attached hereto as Appendix "D." Petitioner now brings this his Petition for Writ of Certiorari to this Court within ninety days of the notice from the Supreme Court of Georgia that it refused to reconsider Petitioner's case.

A copy of the opinion by the Court of Appeals of Georgia in Petitioner's first appeal, referred to above, is attached hereto as Appendix "E."

JURISDICTION

Petitioner brings this his Petition for a Writ of Certiorari to this Honorable Court so that it may review the decision of the Supreme Court of Georgia and of the Court of Appeals of Georgia in refusing to require that Petitioner be resentenced by another judge. The date of the final judgment by the Georgia Supreme Court is January 27, 1977, the day upon which said Court entered its order denying Petitioner's Motion

for a Reconsideration in that Court. The jurisdiction of this Court is invoked under 28 U.S.C. § 1254 (3).

QUESTION PRESENTED

During the presentence hearing following Petitioner's conviction by a jury for simple battery, the trial judge, while apparently looking at a police "rap-sheet," questioned Petitioner about his prior arrests and convictions wherein it was not shown that Petitioner had counsel or had made a knowing and intelligent waiver of counsel. Petitioner appealed the conviction and the sentencing to the Court of Appeals of Georgia. His conviction was affirmed but the case was remanded for resentencing due to the improper consideration of the prior convictions in aggravation of punishment. Petitioner then appeared before the same judge for resentencing at which time Petitioner moved the judge to recuse himself. The judge refused to do so and sentenced Petitioner to the same sentence as he had previously given Petitioner. Petitioner then appealed the refusal of the judge to recuse himself, first, to the Court of Appeals of Georgia, then to the Supreme Court of Georgia, neither of whom would require that Petitioner be resentenced by a judge who had not heard the illegal evidence in aggravation of punishment.

Therefore the question presented is: Is it not a violation of Petitioner's rights under the Sixth and Fourteenth Amendments that he was resentenced by the same judge who initially heard the evidence of the illegal convictions and whose mind was undoubtedly biased against Petitioner as this judge must have formed an opinion, whether consciously or subconsciously, that the Petitioner had a predilection for crime and as this

judge could not have humanly remained unaffected by the evidence of the prior convictions when he resentenced the Petitioner?

CONSTITUTIONAL PROVISIONS INVOLVED

As Petitioner avers that his rights under the Sixth and Fourteenth Amendments to the Constitution of the United States have been violated, he sets forth these Amendments in Appendix "F."

STATEMENT OF THE CASE

The Petitioner was tried and convicted before a jury and judge in the Superior Court of Heard County, State of Georgia, on September 24, 1975 of simple battery and driving under the influence of alcohol. A motion for a new trial was granted as to the charge of driving under the influence and this charge was later nol prossed by the District Attorney. Petitioner appealed his conviction of simple battery to the Court of Appeals of Georgia, 138 Ga. App. 431, 226 S.E.2d 291 (1976) (Appendix E) which upheld the conviction for simple battery, but granted a new trial on the issue of sentence as the State conceded that error was committed in the sentencing phase of the trial when prior convictions which did not show the Petitioner had assistance of counsel, or a waiver thereof, were introduced in aggravation of punishment.

Pursuant to direction from the Court of Appeals of Georgia as aforesaid, Petitioner next appeared before the same judge who had sentenced him earlier to be resentenced. This was on June 25, 1976. At this point Petitioner by written motion and by oral argument moved the trial judge to recuse himself on the grounds

that it would be a violation of Petitioner's Sixth and Fourteenth Amendment rights for the same judge to resentence him as it was this judge who had considered the prior arrests and convictions in aggravation of punishment for which reason the case had been reversed as to sentence. Petitioner further requested that the trial judge should permit another judge to resentence Petitioner, one who had not seen the illegal convictions in aggravation of punishment.

Petitioner here quotes from his Motion for Recusal filed prior to resentencing:

> It is Defendant's contention that the consideration by the trial court of the various prior arrests and convictions, in violation of constitutional standards, has so affected the mind of Judge Knight that it is humanly impossible for him to consider again the question of the sentence of the Defendant without taking into account the previous information about the Defendant that he has learned. The resulting bias to the Defendant, however unconscious, cannot but help to deny the Defendant a fair and impartial hearing regarding sentencing.

Petitioner also filed with the trial court a brief in support of his Motion for Recusal. In the brief Petitioner stated that he "contends that it is inherently unfair to him and is a violation of the due process provision of the United States and Georgia Constitutions for him to be resentenced by the same judge that considered in aggravation of punishment at the sentencing hearing the improperly introduced evidence regarding defendant's [Petitioner's] prior arrests and convictions, for which the Court of Appeals remanded the case for resentencing." Brief in support of Motion, p. 5.

Following oral argument on the motion from both

Petitioner's attorney and from the State, the judge without commenting upon the constitutional issues raised by Petitioner's Motion for Recusal, simply said: "All right, you can take an order overruling the motion." (Transcript of the resentencing hearing, June 25, 1976, p. 9)

Petitioner then appealed the judge's refusal to recuse himself to the Court of Appeals of Georgia, *Johnson v. The State*, 140 Ga. App. 284 (1976) (Appendix A). In his brief to the Georgia Court of Appeals, Petitioner again raised the question of the denial of his right to counsel and of his right to due process of law, contending again that the procedure that was applied in his case by the Georgia courts violated his Sixth and Fourteenth Amendment rights to counsel and to due process of law. In response the Court of Appeals of Georgia held: "[W]e cannot say it [the sentence] was unfairly or improperly imposed." (Appendix A). Petitioner then filed a Motion for a Rehearing in the Court of Appeals of Georgia. This motion was denied on November 1, 1976 without opinion by order of the Court (Appendix B).

Petitioner then filed his Application for a Writ of Certiorari in the Supreme Court of Georgia which was denied on January 7, 1977 without opinion, a copy of said Notice being attached hereto as Appendix C.

Petitioner's Application for Writ of Certiorari to the Georgia Supreme Court concentrated on the denial to Petitioner of his Sixth and Fourteenth Amendment rights and on the violence the Georgia Courts are doing to the Sixth Amendment and the *Gideon v. Wainwright*, infra, line of cases by permitting a judge who has heard evidence of constitutionally invalid convictions to sentence a defendant in a criminal case. In his application, Petitioner quoted *Burgett v. Texas*, infra, and other cases of this Court in support of his contention that his Sixth and Fourteenth Amendment rights have been violated.

Following the denial of Application for Certiorari, Petitioner filed a Motion for Reconsideration which was also denied without opinion on January 27, 1977 (Appendix D).

Below Petitioner sets forth the portion of the original trial transcript that is the source of the Petitioner's argument that he has been denied his constitutional right to counsel and to due process of law. This colloquy between the judge and the Petitioner took place on September 24, 1975 following Petitioner's conviction by the jury and during Petitioner's presentence hearing conducted by the Court. The judge had obtained, from what source it is not known, some sort of F.B.I. or police rap-sheet which showed Petitioner's prior arrests and convictions, but did not show whether or not Petitioner had counsel at the convictions or had intelligently waived counsel. The following then is from p. 71-73 of the transcript of the trial of Petitioner:

"THE COURT: Have you ever been in trouble before, Mr. Johnson?

DEFENDANT: Yes, sir.

THE COURT: How many times have you been in trouble before, Mr. Johnson?

DEFENDANT: About 13 or 14.

THE COURT: Florida, Georgia?

DEFENDANT: All the times I've been in trouble, you see the record showing I was not guilty of the crime I was charged with.

THE COURT: How about assault and battery in '58?

DEFENDANT: Sir, I was in high school and all football players fight after the game most of the time.

THE COURT: 1959?

DEFENDANT: I was in high school also.

THE COURT: 1963, worthless checks.

DEFENDANT: Sir, you will see that I was found not guilty of that.

THE COURT: All right, but you have been arrested, you said, 13 or 14 times?

DEFENDANT: I have been arrested about 13 times, Your Honor, and each time I have been not guilty.

THE COURT: Has this case in Atlanta for robbery been disposed of?

DEFENDANT: They found the right guy, Your Honor, and he's serving time in jail.

THE COURT: How about the larceny, is it just on the dead docket in Atlanta, it hasn't been tried?

DEFENDANT: No, sir, the person that dead-docketed the case found he was telling a lie, he went to prison for the same thing.

THE COURT: How about the wife beating; it doesn't reflect it's been disposed of.

DEFENDANT: That never came up, that was just—we had a misunderstanding, she took a warrant out and went and had it lifted.

THE COURT: All right, in Case Number 2181, that of simple battery, I'll sentence you to the penitentiary for a period of twelve months. Please

remember that this is a misdemeanor punishment but any escape or attempt to escape from this time forward would amount to a felony for which you would be subject to being punished a term in the penitentiary of up to five years.

In Case Number 2187, the case of driving under the influence, I'll sentence you to the penitentiary for a period of twelve months and let it begin at the end of the term I have given you in Number 2181. Please remember this is also a misdemeanor but any escape or attempt to escape from this time forward would amount to a felony for which you would be subject to being punished a term in the penitentiary of up to five years."

ARGUMENT

Petitioner's contention is that it is a violation of his Sixth Amendment right to counsel and a violation of his right to due process of law under the Fourteenth Amendment for him to be resentenced by the same judge who upon Petitioner's first sentencing considered in aggravation of punishment prior arrests and convictions wherein it was not shown that Petitioner had counsel or had made an intelligent waiver of counsel. It has been held many times that a conviction obtained in violation of *Gideon v. Wainwright*, 372 U.S. 335, 83 S.Ct. 792, 9 L.E.2d 799, may not be used to enhance punishment. Moreover, such illegal evidence must undoubtedly prejudice the mind of the sentencing judge, causing him to believe that the man before him has a predilection for crime, so that he can not remain fair and impartial when that man comes before him again for resentencing.

There is no question that the principles of *Gideon v. Wainwright* and *Burgett v. Texas*, 389 U.S. 109, 88

S.Ct. 258, 19 L.E.2d 319, apply in Georgia. In *Clenney v. The State*, 229 Ga. 561, 192 S.E.2d 907 (1972), it is said:

> The United States Supreme Court in Gideon v. Wainwright, 372 U.S. 335 (83 SC 792, 9 LE2d 799, 93 ALR2d 733), established the rule that the right to counsel guaranteed by the Sixth Amendment was applicable to the States by virtue of the Fourteenth Amendment, making it unconstitutional to try a person for a felony in a state court unless he had counsel or had made a valid waiver of counsel. In Burgett v. Texas, 389 U.S. 109, 115 (88 SC 258, 19 LE2d 319), it was held: "To permit a conviction obtained in violation of Gideon v. Wainwright to be used against a person either to support guilt or enhance punishment for another offense . . . is to erode the principle of that case. Worse yet, since the defect in the prior conviction was denial of the right to counsel, the accused in effect suffers anew from the deprivation of that Sixth Amendment right." See also United States v. Tucker, 404 U. S. 443 (92 SC 589, 30 LE2d 592).

In *Harrison v. The State*, 136 Ga. App. 71, 220 S.E.2d 77 (1975), it is said: "It is settled that presuming counsel or waiver of counsel from a silent record is impermissible, that evidence of prior convictions which fails to disclose assistance of counsel or an intelligent and understanding waiver thereof is illegal, and that the admission in evidence at the pre-sentence hearing of such illegal evidence voids the sentence, even in the absence of objection. *Fowler v. State*, 132 Ga. App. 812, 209 S.E.2d 255, and cits. Therefore, the admission of the prior conviction of burglary (as well as the other convictions) in the pre-sentence hearing, was reversible error for the reasons that (1) there were no certified copies of the convictions, introduced by the State after

timely pre-trial notice thereof to the defendant, and (2) the record fails to affirmatively show that the prior convictions were constitutionally valid." *Harrison*, at page 72.

The principles then of *Gideon v. Wainwright* and *Burgett v. Texas* are clear enough in Georgia. However, it is the application of these principles to his case that Petitioner brings to this Court. Is it not a judicial fiction of the highest order, one that pays only lip service to the important constitutional principle embodied in *Burgett v. Texas*, to cite those principles, then to turn around and remand Petitioner's case to the same judge for resentencing as heard the constitutionally invalid evidence in the first instance? The Georgia courts have neatly sidestepped this problem by saying that "[t]here is a presumption, in the absence of a strong showing to the contrary, that the trial judge when sitting without a jury, separates the legal evidence from facts not properly in evidence in reaching his decision." *Ingram v. State*, 134 Ga. App. 935, 940 (8), 216 S.E.2d 608 (1975), cert. denied, 424 U.S. 914, ___ S.Ct. ___, 47 L.E.2d 318, rehearing denied, 425 U.S. 908, ___ S.Ct. ___, 47 L.E.2d 759 (1976), as quoted by the Georgia Court of Appeals in Petitioner's case, *Johnson v. State*, 140 Ga. App. 284, at p. 285 (Appendix A).

Furthermore, in Petitioner's case the Court of Appeals of Georgia apparently found that the trial judge may disabuse his mind of any prior improperly admitted evidence as to other arrests or convictions simply by making a statement at the resentencing that he could not recall what evidence it was he heard at the first sentencing that caused the case to be remanded for resentencing. See page 286 of *Johnson v. State*, 140 Ga. App. 284 (Appendix A).

The colloquy between the trial judge and Petitioner upon his first sentencing has been quoted hereinbefore in the Statement of the Case of the Petitioner. That the trial judge was very much impressed with the long list of arrests of the Petitioner can be seen from the manner in which he questioned the Petitioner about each offense. It should be pointed out that in fact only one of the arrests apparently led to a conviction. It is this evidence submitted in violation of *Burgett v. Texas* that the appeals courts of Georgia say a trial judge may disabuse himself of in sentencing a defendant, thus shutting their eyes to the constitutional error involved and the nullification of a defendant's Sixth and Fourteenth Amendment rights, so long as the trial judge says at resentencing that he does not recall the illegal evidence that caused the case to be reversed and sent back to him. This judicial fiction certainly erodes the principle of *Gideon v. Wainwright*, supra, and *Burgett v. Texas*, supra. Petitioner feels that the constitutional mandate of the Sixth Amendment outweighs the proposition of law, quoted in the opinion of the Court of Appeals in this case (Appendix A), that a judge can separate legal evidence from facts not properly in evidence.

It is not enough upon resentencing that a judge says that he can disabuse his mind of illegally admitted convictions that undoubtedly influenced him in setting the maximum sentence, as was done in Petitioner's case. Judges are human and can no more easily dismiss prejudice from their minds than can a layman. The appearance of justice should be preserved by remanding such cases as this to a different judge for resentencing, to a judge who sees in aggravation of punishment only certified copies of constitutionally valid convictions, introduced by the State after timely pre-trial notice to the defendant. *Van Voltenburg v. State*, 138 Ga. App. 628, 227 S.E.2d 451 (1976).

The appellate courts of Pennsylvania have gone further than the courts of Georgia in preserving Sixth and Fourteenth Amendment rights. In the case of *Commonwealth v. Goodman*, 347 A.2d 682 (Pa. 1973) wherein highly inflammatory testimony was adduced at the suppression hearing which was not germane to the indictment and wherein the same judge that conducted the suppression hearing later tried and sentenced the defendant, the Court said: "If it is established that the information received during the pre-trial proceeding would have been incompetent in the subsequent proceeding and that it was of sufficiently inflammatory nature to arouse a prejudice against the defendant he need not demonstrate that the information actually influenced the Court's actions. We are impressed with the wisdom of the ABA § 1.7 Standards Relating to the Function of the Trial Judge which provides: 'The trial judge should recuse himself whenever he has any doubt as to his ability to preside impartially in a criminal case or *whenever he believes his impartiality can be reasonably questioned.*' " (Emphasis supplied by the Goodman court.) Another Pennsylvania case acknowledges that "We should not rely upon the fiction of a judicial blindside." *Commonwealth v. Green*, 347 A.2d 682 (Pa. 1975). In that case in a dissenting opinion, the writer states: "It has been recognized in other situations that certain erroneously admitted evidence may present as much potential for unfairness whether a judge or a jury sits as trier of the fact. *Commonwealth v. Rivers*, 279 A.2d 766 (Pa. 1971), reversed a conviction saying that the trial testimony about the defendant's prior crimes

and a pending murder charge was so prejudicial that the trial judge (sitting as trier of the facts) 'even though he was an able and experienced trial judge, could have come to no other conclusion that that the appellant had predilection for crime.' Id. at 768. In *Commonwealth v. Lockart*, 322 A.2d 707 (Pa. 1974), the Superior Court noted its opinion that the improper introduction of photographic evidence indicating a prior criminal record which would be reversible error in a jury trial would likewise be reversible error in a non-jury trial." The dissenting opinion in *Green* further says: "[T]o assume qualities of restraint and logic in a judge which we do not assume in a layman does not mean that we should overlook that judges are subject to human nature, or that we should not continuously seek to assure fairness in cases where judges act as the fact-finder." *Green*, at p. 689, quoting from *Commonwealth v. Goodman*, 289 A.2d 186, 189 (Pa. 1972).

This Court has spoken of the necessity of a judge's being free from even the appearance of bias. In *In Re Murchison*, 349 U.S. 133, 75 S.Ct. 623, 99 L.E.2d 942 (1955), this Court said: "A fair trial in a fair tribunal is a basic requirement of due process. Fairness of course requires an absence of actual bias in the trial of cases. But our system of law has always endeavored to prevent even the probability of unfairness. . . . 'Every procedure which would offer a possible temptation to the average man as judge . . . not to hold the balance nice, clear and true between the State and the accused, denies the latter due process of law.' *Tumey v. State of Ohio*, 273 U.S. 510, 47 S.Ct. 437, 71 L.E.2d 749." And further from *In Re Murchison:* "But to perform its highest function in the best way 'justice must satisfy the appearance of justice.' *Offutt v. U.S.*, 348 U.S. 11, 14, 75

S.Ct. 11, 99 L.E. 11."

Furthermore the United States Supreme Court case of *Taylor v. Hayes*, 418 U.S. 488, 94 S.Ct. 2697, 41 L.E.2d 897 (1974) speaks on bias. This case dealt with the sentencing for a contempt by a trial judge of a lawyer who had tried a case before the judge. *Taylor* said that the contemptuous conduct may so embroil the judge that he cannot hold the balance between the State and the appellant and that: "In making this ultimate judgment, the inquiry must be not only whether there was actual bias on respondent's [the Trial Judge] part, but also whether there was such a likelihood of bias or an appearance of bias that the judge was unable to hold the balance between vindicating the interest of the court and the interest of the accused, *Ungar v. Sarafite*, 376 U.S. 575, 588, 84 S.Ct. 841, 11 L.E.2d 921 (1964). Such a stringent rule may sometimes bar trial judges who have no actual bias and who would do their very best to weigh the scales of justice equally between the contending parties, but due process of law requires no less. *In Re Murchison*, 349 U.S. 133, 136, 75 S.Ct. 623, 625, 99 L.E.2d 942 (1955)." *Taylor*, at p. 501.

The Petitioner notes that in its opinion the Georgia Court of Appeals (Appendix A, 140 Ga. App. at p. 285) stated that the Petitioner, according to his attorney's brief and oral argument, did not contend that the trial judge had an actual bias against the Petitioner. This statement misstates Petitioner's position both in his brief and at oral argument. As stated in Petitioner's Motion for Rehearing (hereto attached as Appendix G) to the Georgia Court of Appeals, Petitioner does indeed say that the judge, being human, could not possibly erase such highly inflammatory evidence from his mind

when he resentenced Petitioner. Whether or not this very real bias that the Petitioner alleges existed in the mind of the trial judge at resentencing is the same as "actual bias," as it is defined by Georgia law, is not directly applicable to Petitioner's due process argument before the Court here. To the Court of Appeals of Georgia, the word "actual bias" means that form of bias which has traditionally been grounds for disqualification of a judge to hear a case. Ga. Code Ann. Section 24-102. The Georgia courts have held that the grounds for disqualification listed in this section are exhaustive and do not include alleged bias or prejudice not based on pecuniary or relationship interest. *Yeargin v. Hamilton Memorial Hospital*, 229 Ga. 870, 195 S.E.2d 19 (1972). Petitioner contends that the consideration of the convictions admitted in violation of *Burgett v. Texas* formed an unerasable impression or bias in the mind of the trial judge and that the judge could not possibly fairly resentence the Petitioner after having seen the very highly inflammatory evidence that he saw at the first sentencing. This form of bias is very real and just as "actual" as the more traditional form of bias.

Here indeed is a situation where "[W]e may think it the better practice for a trial judge, in such an instance, to recuse himself whenever he believes his impartiality can reasonably be questioned." *Johnson v. The State*, 140 Ga. App. at p. 285.

Thus Petitioner here contends that the error committed by the appeals courts of Georgia in remanding his case for resentencing to the same judge who committed the original error is a violation of his right to due process of law under the Fourteenth Amendment. "Every procedure which would offer a possible temptation to the average man as judge . . . not to hold the balance nice, clear and true between the State and the accused, denies the latter due process of law." *In Re Murchison*, supra.

Petitioner's contention is then that the Georgia practice of remanding cases for resentencing to the same judge that at the first sentencing considered convictions admitted in violation of *Burgett v. Texas* nullifies the principle of that case and, in Petitioner's case, voided Petitioner's Sixth Amendment right to counsel. Furthermore, it is a violation of due process of law under the Fourteenth Amendment to remand such a case to the same judge as such highly inflammatory evidence of previous convictions undoubtedly gives rise to a prejudice in the mind of the judge against the defendant before him to such an extent that he cannot erase it and cannot sentence the defendant fairly and impartially.

CONCLUSION

Petitioner believes that this Court should grant Certiorari in order to answer the issues of constitutional law that are raised in the Petition and to rectify the denial to the Petitioner of his constitutional rights under the Sixth and Fourteenth Amendments. For the foregoing reasons, it is respectfully urged that this Petition for a Writ of Certiorari be granted.

Respectfully submitted,

/s/ MURRAY M. SILVER
MURRAY M. SILVER

/s/ DANIEL S. ZEVIN
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/s/ PAUL J. SEWELL
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APPENDIX

APPENDIX A

52899. JOHNSON v. THE STATE

WEBB, Judge.

On a previous appearance of this case the state conceded "that error was committed in the sentencing phase of the trial when prior convictions which did not show that Johnson had assistance of counsel, or a waiver thereof, were introduced in aggravation of punishment," and we reversed on that issue only. *Johnson v. State*, 138 Ga. App. 431 (2) (226 SE2d 291) (1976). The facts will not be repeated here.

At the new trial on the issue of sentence, appellant moved that the trial judge recuse himself to permit appellant to be sentenced by another judge who had not heard any evidence of appellant's prior arrests and convictions. The trial judge declined to recuse himself, and sentenced appellant to the same term previously set, twelve months. Appellant assigns error on the trial judge's failure to recuse himself.

Before sentencing the appellant anew, the trial judge made the following statement: "Will the defendant come forward, please. Let me state for the record at this time that I did try the case and based on what has been said by counsel representing not only the defendant but counsel representing the State, I assume that there was evidence brought out by the Court in the questioning concerning possibly some back record. I have not reviewed that since that date. I have tried numerous cases, and I don't even remember what it was, if it was anything, at this point, I don't remember it, and I did not review it intentionally, so I would not know about it, and I certainly do not intend to let whatever it was,

if anything, prejudice me in the punishment that I shall fix at this time . . ."

"[T]here is a presumption, in the absence of a strong showing to the contrary, that the trial judge, when sitting without a jury, separates the legal evidence from facts not properly in evidence in reaching his decision." *Ingram v. State*, 134 Ga. App. 935, 940 (8) (216 SE2d 608) (1975), cert. den. 47 LE2d 318, reh. den. 47 LE2d 758 (1976).

We recognize that "[a] fair trial in a fair tribunal is a basic requirement of due process. Fairness of course requires an absence of actual bias in the trial of cases . . . [O]ur system of law has always endeavored to prevent even the probability of unfairness . . . '[J]ustice must satisfy the appearance of justice,' " and due process requires no less. *In re Murchison*, 349 U.S. 133, 136 (75 SC 623, 99 LE 942) (1955). Here there was no running controversy between either the appellant or his counsel and the trial judge, as there was in *Taylor v. Hayes*, 418 U.S. 488, 501 (94 SC 2697, 41 LE2d 897) (1974), a contempt proceeding cited by appellant.

We are impressed with the wisdom of the statement on circumstances requiring recusation, as set forth in the standards relating to *The Function of the Trial Judge*, found in ABA's Standards for Criminal Justice (1972), § 1.7. That standard reads: "The trial judge should recuse himself whenever he has any doubt as to his ability to preside impartially in a criminal case or whenever he believes his impartiality can reasonably be questioned." One of the commentaries published with this standard is, however, that "[U]nless otherwise required by statute, a judge should avoid withdrawing from a case merely because a charge of bias has been made . . .

Demands for recusation can be used as an indirect means of attempting to choose the judge who will sit in the case . . . Delays in trial and inefficient use of judicial manpower are other possible consequences of such abuse."

In this case appellant, according to his counsel's brief and oral argument, does not contend that the trial judge had an actual bias against him. He contends that because in the first sentencing, evidence improperly introduced nine months before the second sentence regarding his prior arrest and convictions could not have been removed from the judge's mind. While we may think it the better practice for a trial judge, in such an instance, to recuse himself whenever "he believes his impartiality can reasonably be questioned," we cannot say that the trial judge here, in view of his statement made before sentencing and hereinabove quoted, did not sufficiently disabuse his mind of any prior improperly admitted evidence as to other arrests or convictions. This is especially true since appellant's counsel disavowed any charge of bias on the part of the trial judge. *Knight v. State*, 133 Ga. App. 808, 809 (2) (212 SE2d 464) (1975); *Workman v. State*, 137 Ga. App. 746, 749 (7) (224 SE 2d 757) (1976) cert. den.

The sentence of 12 months is within the terms provided by statute for a misdemeanor, is less than the maximum punishment, and we cannot say it was unfairly or improperly imposed.

Judgment affirmed. Deen, P. J., and Smith, J., concur.

ARGUED OCTOBER 5, 1976 — DECIDED OCTOBER 19, 1976 —

REHEARING DENIED NOVEMBER 1, 1976 — CERT. APPLIED FOR.

Simple battery. Heard Superior Court. Before Judge Knight.

Silver, Zevin, Sewell & Turner, Daniel S. Zevin, Paul J. Sewell, for appellant.

William F. Lee, Jr., District Attorney, Robert H. Sullivan, Assistant District Attorney, for appellee.

APPENDIX B

Court of Appeals
of the State of Georgia

ATLANTA, November 1, 1976

The Honorable Court of Appeals met pursuant to adjournment.

The following order was passed:

52899. D. R. Johnson v. The State

Upon consideration of the motion for a rehearing filed in this case, it is ordered that it be hereby denied.

Court of Appeals of the State of Georgia

CLERK'S OFFICE, ATLANTA NOV 1 1976

I certify that the above is a true extract from the minutes of the Court of Appeals of Georgia.

Witness my signature and the seal of said court hereto affixed the day and year last above written.

Morgan Thomas, **CLERK.**

APPENDIX C

CLERK'S OFFICE, SUPREME COURT OF GEORGIA

Atlanta 1-7-77

Dear Sir:
Case No. 31894, Johnson v. The State

The Supreme Court today denied the writ of certiorari in this case.

Very truly yours,
MRS. JOLINE B. WILLIAMS, Clerk

APPENDIX D

Clerk's Office, Supreme Court of Georgia

DEAR SIR: ATLANTA 1/27/77

The motion for a ~~rehearing~~ reconsideration was denied today:

Case No. 31894, Johnson v. The State

Yours very truly,

MRS. JOLINE B. WILLIAMS, Clerk

APPENDIX E

51967. JOHNSON v. THE STATE.

WEBB, JUDGE.

David Reuben Johnson appeals from his conviction of the charge of simple battery and the denial of his motion for new trial.

1. Johnson was arrested for driving under the influence of alcohol and taken to the Heard County Sheriff's office for an intoximeter test. An altercation ensued during which Johnson struck a deputy with his fist and the deputy hit Johnson with his flashlight two or three times. Johnson contends that the contradictory nature of the testimony of the two state witnesses renders the case against him unworthy of belief.

We do not agree. The testimony of the two officers present was not inconsistent and the jury was authorized to find Johnson guilty of simple battery if it elected to believe them. " 'After the verdict, the testimony is construed in its most favorable light to the prevailing party, which in this case is the state, for every presumption and inference is in favor of the verdict. *Bell v. State*, 21 Ga. App. 788 (95 SE 270).' It is for the jury to weigh the evidence and determine the credibility of the testimony and the witnesses." *Heilman v. State*, 132 Ga. App. 775, 780 (209 SE2d 220).

2. The state concedes that error was committed in the sentencing phase of the trial when prior convictions which did not show that Johnson had assistance of counsel, or a waiver thereof, were introduced in aggravation of punishment. Therefore a new trial is granted on the issue of sentence only. *Harrison v. State*, 136 Ga. App. 71 (220 SE2d 77).

Judgment affirmed in part and reversed in part. Deen, P. J., and Quillian, J., concur.

ARGUED APRIL 12, 1976 — DECIDED APRIL 22, 1976.

Simple battery. Heard Superior Court. Before Judge Knight.

Silver, Zevin, Sewell & Turner, Daniel S. Zevin, Paul J. Sewell, for appellant.

William F. Lee, Jr., District Attorney, Robert Sullivan, Assistant District Attorney, for appellee.

APPENDIX F

Sixth and Fourteenth Amendments, U.S.C.

SIXTH AMENDMENT, CONSTITUTION OF THE UNITED STATES

In all criminal prosecutions, the accused shall enjoy the right to a speedy and public trial, by an impartial jury of the State and district wherein the crime shall have been committed, which district shall have been previously ascertained by law, and to be informed of the nature and cause of the accusation; to be confronted with the witnesses against him; to have compulsory process for obtaining witnesses in his favor, and to have the Assistance of Counsel for his defense.

FOURTEENTH AMENDMENT, CONSTITUTION OF THE UNITED STATES

Section 1. All persons born or naturalized in the United States, and subject to the jurisdiction thereof, are citizens of the United States and of the State wherein they reside. No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws.

APPENDIX G

IN THE COURT OF APPEALS
STATE OF GEORGIA

DAVID RUBEN JOHNSON,
Appellant,
vs.
THE STATE OF GEORGIA,
Appellee.
} CASE NO. 52899

MOTION FOR REHEARING

Now Comes the appellant, DAVID RUBEN JOHNSON, through his counsel and pursuant to Rules 19 and 33 of the Court of Appeals of Georgia, and files this Motion for Rehearing. In support of this Motion the appellant shows:

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That the Court of Appeals in its opinion overlooked the material fact in the record that the trial judge at the first sentencing of appellant following appellant's trial heard blatantly prejudicial evidence in violation of appellant's constitutional rights that most certainly caused the judge to feel that appellant had a predilection for crime and that at that point a bias was formed in the judge's mind that the passage of time cannot erase. Furthermore, the *pro forma* denial by the judge at the second sentencing that he would not allow whatever evidence it was he heard to affect his decision as to what sentence to set is pure judicial fiction and a reliance on the judicial "blindside" that only judges and some lawyers understand. The general public and

particularly those who are affected by the judicial system cannot and will not ever understand such a judicial fiction.

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That the Court of Appeals in its opinion erroneously construed that portion of appellant's brief that stated that the trial judge had no "actual bias" against appellant when in its opinion at Page 4 the Court of Appeals stated: "Appellant's counsel disavowed any charge of bias on the part of the trial judge." Appellant's counsel definitely stated in his brief and at oral argument that the trial judge had formed an unerasable impression in his mind that the appellant had a predilection for crime based on evidence that should never have been heard. It is patently unfair to deny appellant's appeal simply because the Court of Appeals and appellant's counsel failed to have a meeting of the minds on what "actual bias" is. The bias that appellant's counsel contends the trial judge had is "actual" in the sense that the bias actually exists in the judge's mind. Appellant's counsel never disavowed this form of bias.

By the "actual bias" referred to in appellant's counsel's brief and in his oral argument, appellant's counsel was referring to a pre-existing bias on the judge's part that comes from some contact or relationship with the appellant prior to hearing his case that would have traditionally been grounds for disqualification of the judge.

Appellant's counsel prays that the Court of Appeals reconsider its opinion in this light. Appellant's counsel never "disavowed *any* charge of bias on the part of the trial judge" [emphasis by appellant] and to reaffirm what counsel said in his brief: the evidence admitted in violation of appellant's constitutional rights, heard

for the enhancement of punishment, caused an unerasable bias in the mind of the trial judge from which he, as a judge, just like any other human being, could not disabuse himself.

WHEREFORE, appellant respectfully requests that the Court of Appeals grant a rehearing of this appeal.

Respectfully submitted,

/s/ DANIEL S. ZEVIN
DANIEL S. ZEVIN

/s/ PAUL J. SEWELL
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